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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JIMMIE STEPHEN,

12 Petitioner,

13 v.

14 HERNANDEZ, et al., Warden

15 Respondent.

Civil No. 08-0357 LAB (BLM)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

16 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas
17 Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to
18 move to proceed in forma pauperis.

19 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

20 Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or
21 qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See
22 Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit,
23 **no later than April 15, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof of
24 his inability to pay the fee.

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FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM

Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner has failed to allege that his state court conviction or sentence violates the Constitution of the United States.

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the United States.” *See* 28 U.S.C. § 2254(a).

Here, Petitioner claims that the Court erred in dismissing several of his civil rights complaints, filed under 42 U.S.C. § 1983; and counting the dismissals as strikes under 28 U.S.C. § 1915(g). (*See* Pet. at 6, 7, 9, 11.) In no way does Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254. Moreover, Petitioner’s claims are not cognizable on habeas because they do not challenge the constitutional validity or duration of Petitioner’s confinement. *See* 28 U.S.C. § 2254(a); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973); *Heck v. Humphrey*, 512 U.S. 477, 480-85 (1994). “Section 2254 applies only to collateral attacks on state court judgments.” *McGuire v. Blubaum*, 376 F. Supp. 284, 285 (D. Ariz. 1974).

FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES

Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal habeas claim and then refile the amended petition in this case. He must exhaust state judicial remedies before bringing his claims via federal habeas. State prisoners who wish to challenge

1 their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);
 2 *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a
 3 California state prisoner must present the California Supreme Court with a fair opportunity to
 4 rule on the merits of every issue raised in his or her federal habeas petition. *See* 28 U.S.C.
 5 § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court
 6 judicial remedies a petitioner must allege, in state court, how one or more of his or her federal
 7 rights have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995)
 8 reasoned: “If state courts are to be given the opportunity to correct alleged violations of
 9 prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting
 10 claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For example,
 11 “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him
 12 the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in
 13 federal court, but in state court.” *Id.* (emphasis added).

14 Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective
 15 Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of
 16 limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant
 17 to the judgment of a State court. The limitation period shall run from the latest of:

18 (A) the date on which the judgment became final by the
 19 conclusion of direct review or the expiration of the time for seeking
 such review;

20 (B) the date on which the impediment to filing an application
 21 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 by such State action;

22 (C) the date on which the constitutional right asserted was
 23 initially recognized by the Supreme Court, if the right has been
 newly recognized by the Supreme Court and made retroactively
 24 applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim or
 26 claims presented could have been discovered through the exercise
 of due diligence.

27 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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1 The Court also notes that the statute of limitations does not run while a properly filed state
 2 habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003,
 3 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). *But see Artuz v. Bennett*, 531 U.S. 4,
 4 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by
 5 the appropriate court officer for placement into the record] are in compliance with the applicable
 6 laws and rules governing filings.”). However, absent some other basis for tolling, the statute of
 7 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167,
 8 181-82 (2001).

9 FAILURE TO NAME A PROPER RESPONDENT

10 Finally, review of the Petition reveals that Petitioner has failed to name a proper
 11 respondent. On federal habeas, a state prisoner must name the state officer having custody of
 12 him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule
 13 2(a), 28 U.S.C. foll. § 2254). “The ‘state officer having custody’ may be ‘either the warden of
 14 the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state
 15 penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note).

16 Here, Petitioner incorrectly named “Hernandez,” “IRS,” “Rhodes,” “Lacy,” “Shear,” and
 17 “The Attorney General of the State of California” as Respondents. None of these parties has
 18 custody over Petitioner, who is confined at California Men’s Colony. In order for this Court to
 19 entertain the Petition filed in this action, Petitioner must name the warden *currently* in charge
 20 of the state correctional facility in which Petitioner is presently confined or the Director of the
 21 California Department of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir.
 22 1992) (per curiam).

23 CONCLUSION

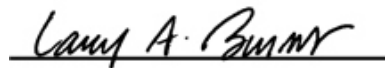
24 Based on the foregoing, the Petition is **DISMISSED** without prejudice for failure to
 25 satisfy the filing fee requirement, failure to state a cognizable federal habeas corpus claim,
 26 failure to allege exhaustion of state judicial remedies and failure to name a proper respondent.
 27 In order to have this case reopened, Petitioner must, **no later than April 15, 2008**, (1) either

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1 pay the filing fee or provide adequate proof of his inability to pay and (2) file a First Amended
2 Petition which cures the deficiencies discussed above. *For Petitioner's convenience, the Clerk*
3 *of Court shall attach to this Order a blank application to proceed in forma pauperis and a blank*
4 *First Amended Petition form.*

5 **IT IS SO ORDERED.**

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7 DATED: February 29, 2008

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9 HONORABLE LARRY ALAN BURNS
10 United States District Judge
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